Supreme Court, U.S.
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No. 03-1015

IN THE

Supreme Court of the United States

BANK AUSTRIA AG, ET AL.,
Petitioners,

v.

JOHN L. SNIADO, III, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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For the proper disposition of this petition, the Court need look no further than the question presented as it has been framed by respondent: "Does the Foreign Trade Antitrust Improvements Act preclude an antitrust action in which a plaintiff was injured *abroad* as a result of defendants' unlawful international conspiracy, where the anticompetitive behavior is alleged to have a direct, substantial and reasonably foreseeable effect on United States Commerce?" (Opp. i.) (emphasis added). This is essentially the same question that the Court will resolve in *F. Hoffmann-La Roche Ltd.* v. *Empagran, S.A.*, No. 03-724 (cert. granted Dec. 15, 2003). There should be no dispute that the present petition for certiorari should be held until the Court decides in *Empagran* whether a plaintiff may pursue a Sherman Act claim for injuries sustained in transactions occurring entirely outside United States commerce.

Respondent nonetheless makes two arguments to try to prevent the Court from holding this petition. He asserts that (1) additional proceedings in the district court will help develop the record, particularly on the issue of whether the alleged foreign conspiracy had a "direct, substantial, and reasonably foreseeable effect" on United States commerce, as required by the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a (Opp. 10); and (2) "antitrust standing is not a question warranting Supreme Court review" (*id.*). Neither of these arguments has merit.

First, whether respondent can develop the record about the alleged conspiracy's effect on United States commerce through additional discovery is simply irrelevant at this point. The dispositive legal issue in the Second Circuit opinion was whether respondent could seek redress for alleged antitrust injuries sustained in transactions that occurred entirely in Europe, merely because the alleged anticompetitive behavior might have injured *someone else* in the United States. That is also the core issue in *Empagran*. The court of appeals assumed for purposes of its decision that respondent would be able to prove that the alleged anticompetitive conduct had some effect on someone in the United States, though not respondent himself. If the Court rules in *Empagran* that an antitrust plaintiff such as respondent must show that the conspiracy injured him—and not someone else—in domestic commerce, then respondent's claim will have to be dismissed regardless of whether the alleged conspiracy had an effect on United States commerce. There is simply no need to develop the record in the district court before the Court announces its decision and determines whether respondent has any possible legal basis on which to proceed with his suit. Moreover, the international discovery sought by respondent would be a massive waste of judicial resources, time, and money if the *Empagran* decision establishes that respondent's claim is barred in the first instance.[1]

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[1] Respondent misleadingly implies that the district court considered affidavits attached to the parties' motions in granting petitioners' motion to dismiss. Opp. 3. That is false: the district court's opinion relied solely

Second, the question whether a person in the respondent's position has antitrust standing is already before the Court. The *Empagran* petitioners raised in their petition for certiorari the issue of whether plaintiffs injured abroad have standing to sue under the Sherman Act, 03-274 Pet. for Cert. 20-21, and that petition was granted. Further, respondent does not explain why the district court should devote its resources to duplicating the Court's efforts at resolving this question. Petitioners submit that the better course would be for the Court to hold the petition so that the district court (and the Second Circuit) may apply the principles that will be announced by the Court in *Empagran*.

The bottom line is that nothing in the Respondent's opposition brief provides any legitimate reason for the Court not to hold the petition pending the outcome of *Empagran*. That case will decide critical issues that are potentially dispositive of the respondent's claim, and further proceedings below should be deferred until the announcement of the Court's opinion in *Empagran*, which may render further proceedings pointless.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *F. Hoffmann-La Roche Ltd.* v. *Empagran, S.A.*, No. 03-724 (cert. granted Dec. 15, 2003), and then the judgment of the court of appeals should be vacated and remanded to the Second Circuit for further proceedings in accordance with the Court's opinion in that case.

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on the allegations in the complaint, and on respondent counsel's admission during oral argument that respondent had exchanged currencies in Europe, but not in the United States. Pet. App. 10a.

Respectfully submitted,

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